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Supreme Court of the United States

OCTOBER TERM, 1930.

No. 4

THE HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY OF WISCONSIN, *Appellant,*

vs.

THE GLIDDEN COMPANY, ET AL., *Appellees.*

REPLY TO APPELLEES' BRIEF ON JURISDICTION.

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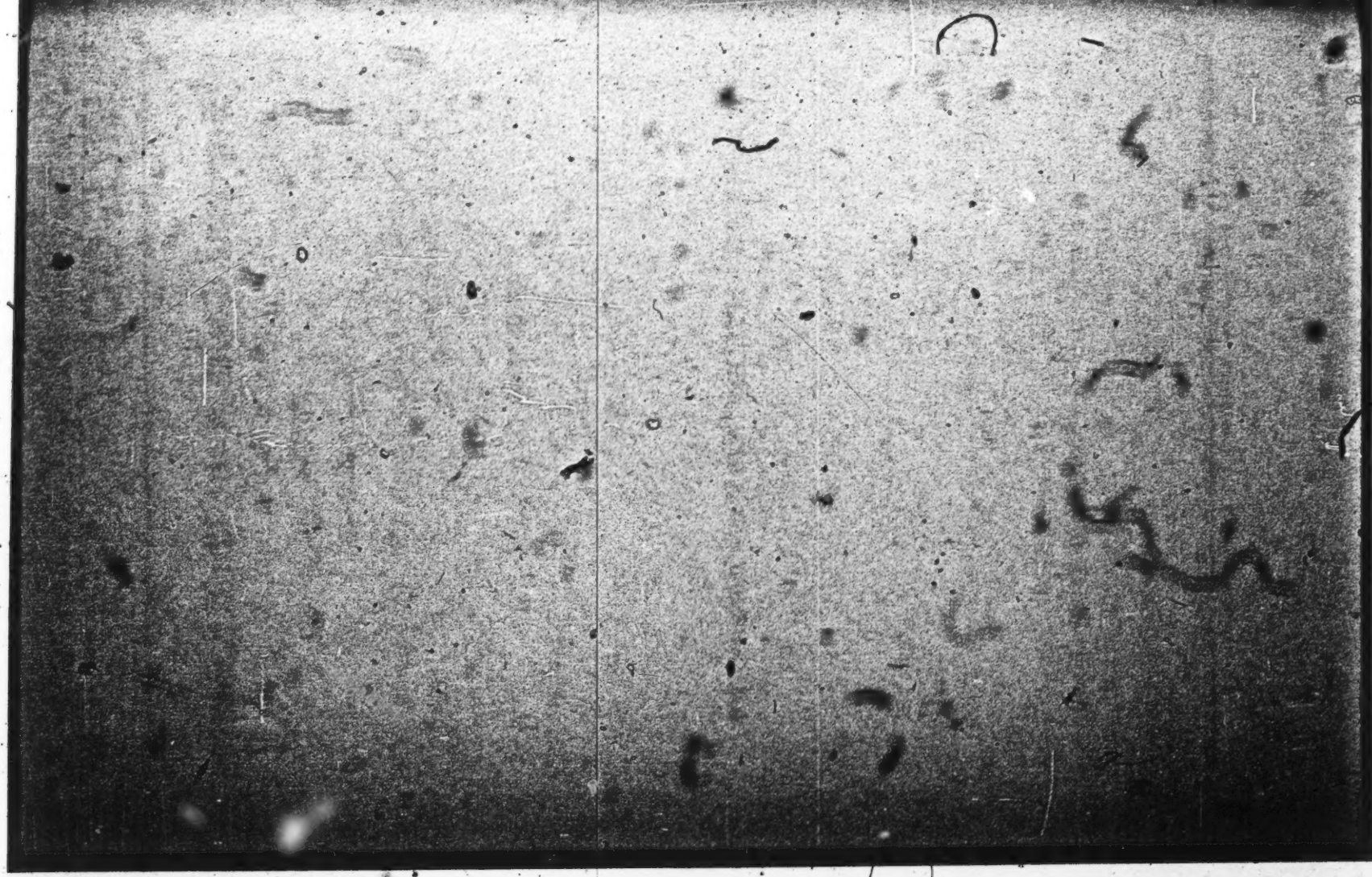

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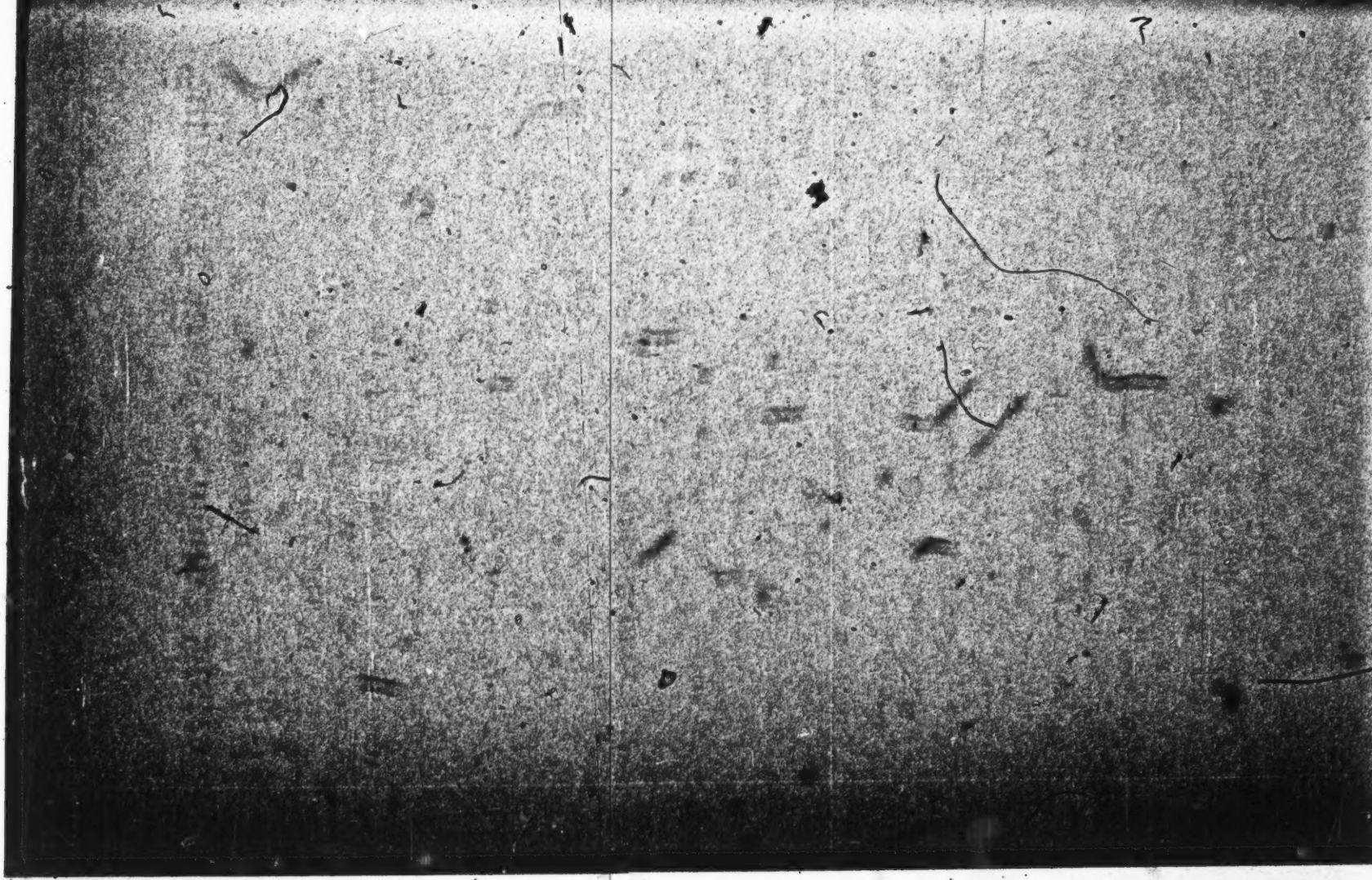

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 605.

THE HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY OF WISCONSIN,

Appellant,

vs.

THE GLIDDEN COMPANY, ET AL.,

Appellees.

REPLY OF APPELLANT ON JURISDICTION.

The brief or statement of appellees in opposition to the jurisdiction on the present appeal is so obviously misleading and evasive as to justify this statement in reply.

At the outset it is broadly stated the decision of the Supreme Court of Minnesota was placed on distinct grounds, one federal and the other non-federal; that both grounds were substantial; that the decision may be sufficiently rested on the non-federal ground and that the judgment is therefore not appealable.

The first answer to this is that it is not a fact. There is no allusion in the opinion to any non-federal ground. The contention proceeds from inference and the fact that the Court cited its previous decision in *Itasca Paper Co. vs. Niagara Fire Insurance Company*, 175 Minn. 73. It will be observed, however, that in the case under review, the opinion excluded all reference to the theory of voluntary

contracts on which the idea of a non-federal ground of decision is based. The reason for the omission will be presently adverted to.

The second answer to the contention is sufficiently indicated in the numerous holdings of this court to the effect that the untenable assertion and reliance by a state court on a non-federal ground is not conclusive.

The principle was clearly stated, and the authorities cited, in *Ward vs. Love County*, 253 U. S. 17, in the syllabus, as follows:

> "The jurisdiction of this court to review a judgment of a state court the effect of which is to deny a federal right, cannot be avoided by placing such judgment on non-federal grounds which are plainly untenable."

The opinion, which expounded the principle in more detail, added the following terse comment:

> "Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided."

It is unnecessary to cite the many cases in which the rule thus indicated has been applied. To characterize a contract, the form of which is prescribed by statute; the terms of which are made compulsory and failure to employ which is visited with criminal responsibility as well as the forfeiture of the privilege of doing business; as voluntary, is an anachronism.

Of the statutory requirements thus indicated, the Supreme Court of Minnesota said in *Wild Rice Lumber Company vs. Royal Insurance Company*, 90 Minn. 190:

> "A glance at the history of the standard form of policy makes it very clear that the legislature of this

state intended to deprive insurance companies of the right to add to or change the terms and conditions of the prescribed form. * * * The conclusion is inevitable that the legislature intended to deprive the parties of the right to make insurance contracts in any form except as prescribed by the statute."

In *Heim vs. American, etc., Insurance Company*, 147 Minn. 283, 288, after referring to the statutory form of policy, it was said:

"Its use is compulsory. With such changes as are authorized by statute, it is the only form of fire insurance contract which may lawfully be used in this state. Its provisions not only constitute the contract between the insurer and the insured, but the law governing the rights of the parties as well."

In the same case it was held that where the contract between the parties failed to incorporate the statute or its requirements, the latter would be interpolated thereon by implication.

The resulting situation falls more nearly under what this court has characterized as agreements exacted by the state through "duress."

In *Union Pacific Ry. Co. vs. Public Service Comm.*, 248 U. S. 68, this court held that the question whether there was any basis for the assertion that a federal right had been waived, was for its own determination, adding:

"Were it otherwise, as conduct under duress involves a choice, it always would be possible for a state to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it and then to declare the acceptance voluntary as was at

excepted in *Atchison, Topeka & Santa Fe Ry. Co. vs. O'Connor*, 223 U. S. 280."

It will be observed that precisely the same question would arise if the legislation had prescribed, and the Standard Form of policy contained, a provision waiving recourse by the insurer to the Federal Courts.

In the Itasca case, the Supreme Court of Minnesota indicated as one of the grounds of its decision on the constitutional question, the idea of a voluntary contract. That case resulted in a reversal and thus precluded, bringing the constitution question before this court.

In re-arguing the question in the instant case, it was shown that the theory of voluntary contract was wholly inconsistent with and destructive of the *compulsory system of arbitration*. This, for the very obvious reason, that from the earliest times that court had held the appraisal in insurance cases as having all of the ordinary attributes of a common law arbitration. Considered from the standpoint of a voluntary contract (excluding the statutory sanction and compulsion) the submission would be subject to revocation by either party at any time before an award was rendered. The inescapable conclusion thus indicated presumably explains the omission of any reference in the decision in question to the theory of a voluntary contract and the emphasis laid on the compulsory requirement of the statute.

The features thus indicated should effectually exclude the contention of a non-federal ground in the instant case.

The statement that most of the states have prescribed standard forms of policies incidentally incorporating compulsory features for appraising the amount of loss and dam-

age in insurance cases [illegible] the least disingenuous.

Minnesota, as counsel well know, is the only state which has assumed to prescribe the compulsory system [illegible] question. No other state has assumed to prescribe a system denying insurers the right of recourse to the courts for the purpose of determining the amount of their liability, excepting in cases where that right is voluntarily waived.

Under the common and ordinary form of contract, the insurer may require arbitration of the amount of loss or damage and until such requirement is acceded to, non-compliance may be asserted (unless otherwise waived) as a defense to an action on the policy. The assured does not lose his right but is merely held to the terms of the agreement prescribing that arbitration, where demanded, shall be a condition precedent to suit brought.

The case presents an anomalous aspect in the circumstance that the Supreme Court of Minnesota has held that the legislature of that state has no constitutional authority to authorize the compulsory reference by a court, of an issue arising in an action at law.

St. Paul, etc., Ry. vs. Gardner, 19 Minn. 132.

It is interesting to surmise, in determining the question of legislative authority, where any legal distinction can be found between an act which assumes to confer upon the courts of the state, the right to require a compulsory reference and an act which confers a similar right on one of the parties to a contract without the intervention of the court. The contention the legislation has been acquiesced in, is not germane. An unconstitutional law is not purged of its vice by age. The statement, however, is not in strict accord with the fact. The constitutionality of the law was [illegible]

lunged in *Abromowitz vs. Continental Ins. Co.*, 170 Minn. 215, and again in the Itasca case, *supra*.

Were the fact otherwise, however, the court will immediately perceive the practical phases with which the insurers have been confronted and the consequent, though perhaps ill-advised, policy which has prompted submission to the imposition of this reprehensible law. The suggestion that the requirements of the law are not discriminatory calls to mind the terse statement of Chief Justice White in *Harrison vs. St. Louis, etc., Ry. Co.*, 232 U. S. 318, 332, as follows:

> "At once it is to be observed that the contention proceeds upon a self-evident misconception which is this, that if only wrong be indiscriminately done, it becomes rightful."

Allusion to the fact that the insurers are not denied recourse to the courts is distinctly misleading.

The award is conclusive. There is neither right of appeal nor review by the courts. The authority of the arbitrators has been thus stated by the Supreme Court of Minnesota in *American Central Ins. Co. vs. District Court*, 125 Minn. 374, 378:

> "In the case at bar the appraisers must determine many matters other than the mere value of specific property produced before them for examination and appraisal. They must determine the quantity of property covered by the policy and on hand at the time of the fire, the quantity destroyed, the quantity damaged, whether the damage resulted from causes covered by the policy or from other causes not covered thereby and various other questions, both of law and fact, upon which the parties may differ."

The award rendered by the extra-judicial body thus con-

templated may be impeached for fraud or corruption of the arbitrators or appraisers. The circumstance that the award is grossly excessive may constitute evidence of fraud as in cases of arbitrations in general.

Christiansen vs. Norwich Union Fire Ins. Co., 84 Minn. 526.

The reference to those great landmarks in insurance law of *Scott vs. Avery*, 5 H. L. Cas. 811, and *Hamilton vs. Insurance Co.*, 136 U. S. 242, is so profoundly irrelevant to anything with which the instant case is concerned as to cause bewilderment.

The repeated allusion to the thousands of dollars collected in premiums from policyholders while this provision of the law has been in effect, has not been overlooked. There is, however, a shrieking silence in the omission of any allusion to the hundreds of thousands of dollars in which the insurers have been mulcted as a result of this law and the *ex parte* arbitrations thereunder, of the large class of losses which shrink from the publicity of ordinary judicial investigation.

As the idea last indicated has been injected in the argument without justification, counsel have no hesitation in saying that no system was ever evolved which placed a greater premium on unscrupulous "adjusters" for the assured or subjected the insurers to more unconscionable fraud.

The brief of appellees on the question of jurisdiction in the instant case, has obviously been prepared as an anticipatory argument on the merits, aimed at minimizing the importance of the questions involved and prejudicing their ultimate consideration by the Court.

The procedure thus followed does not accord with the obvious purpose of the rule of this Court; is distinctly un-

false and prejudicial to appellant and should be regarded accordingly.

The concluding statement, in effect, that the controlling principles have already been decided is disclosed as a fiction from the circumstance that no law of similar character to that here involved has ever been enacted by any other state than Minnesota and no case has ever been brought before this Court in which that law was involved.

Fundamentally, as shown in our original statement of jurisdiction, the instant case has to deal with an attempted legislative extension of the police power to a subject wholly without the domain of matters to which that power may address itself, within the principles decided by this Court. In its arbitrary exactions, it transcends the limits which have been fixed by this Court respecting the interference with the ordinary liberties of contract unless it be assumed (which this Court has expressly denied in many cases) that all constitutional barriers may be struck down. It lacks even the sanction of assumed evils which was stressed in the recent decision of this Court in *O'Gorman & Young, Inc., vs. Hartford Fire Insurance Company*, Adv. Op. 162 (51 Sup. Ct. Rep. 130). At least it suggests nothing in this latter regard which might be made an excuse for the denial of due process of law in almost innumerable other branches of ordinary affairs.

Finally, it invokes the application of the rule which was stated in the recent opinion in *United States vs. Chicago, Milwaukee & St. Paul Ry. Co.*, Adv. Op. 142 (51 Sup. Ct. Rep. 158), in the following language:

"Broadly stated, the rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a

condition prescribed by the statute [illegible] provisions of the Federal Constitution.

The case of appellant is clearly within the terms of the statute cited in our original statement and the merits of the questions of law involved should not be anticipated on the consideration of the preliminary question of jurisdiction.

Respectfully submitted,

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APPELLANT'S BRIEF.

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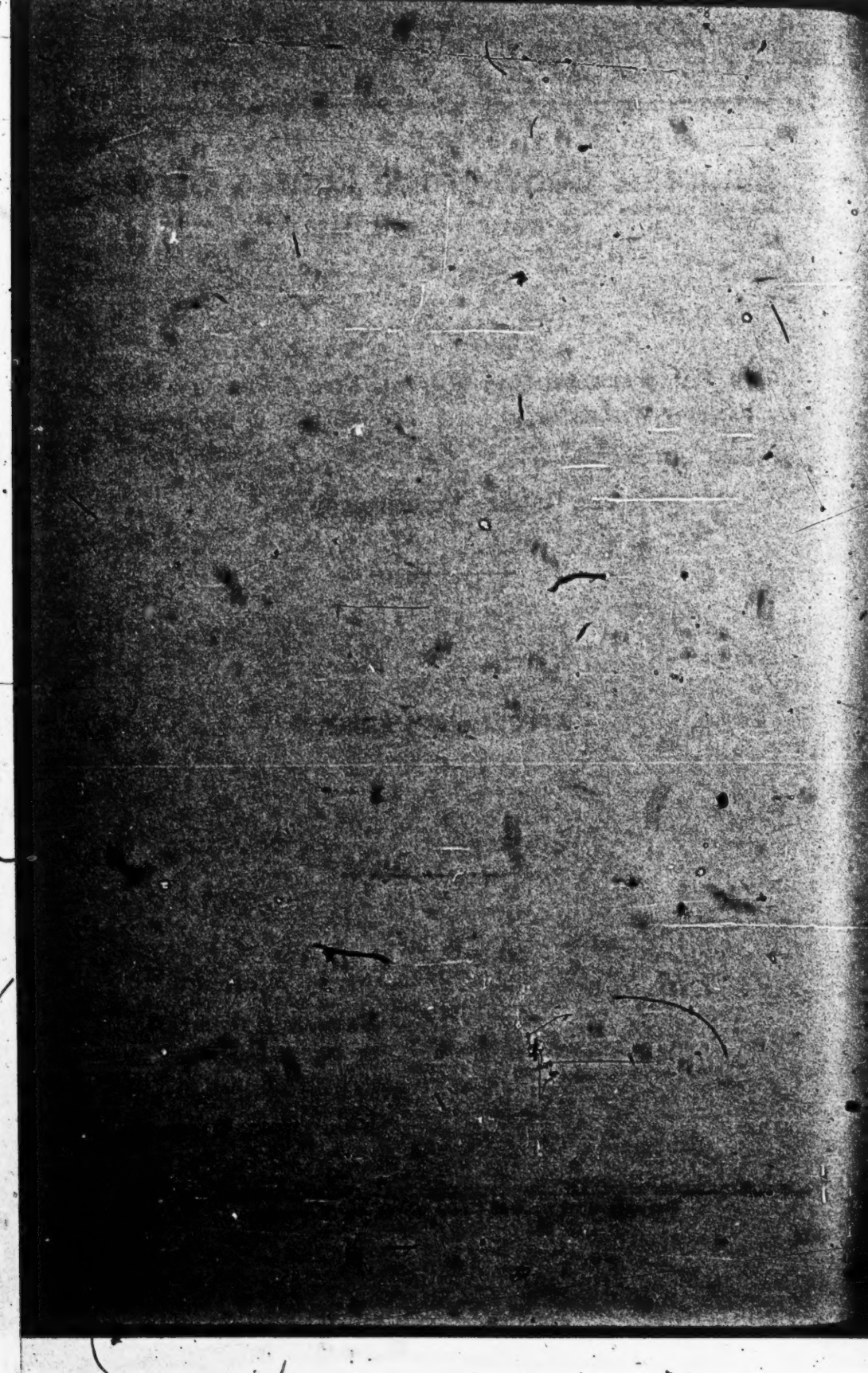

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APPELLANT'S BRIEF.

The present appeal was taken to review and reverse a final judgment against appellant rendered by the Supreme Court of the State of Minnesota, that court being the highest tribunal in the state in which a decision of the subject matter in controversy could be had. The controversy below turned on the validity of a statute of the State of Minnesota asserted to have been violative of the Constitution of the United States. The decision affirmed the statute's validity.

STATEMENT.

For the purpose of presenting the issues arising on the present appeal, a relatively brief statement of the case will suffice.

The State of Minnesota has adopted, and for many years there have been in force in that state, statutes regulating